of the parties has, according to the law of his, or her, respective domicile, the capacity to marry the other, and that certain conditions as to the form of celebration therein stated had been complied with. This general rule is supported by authority, and is not disputed in so far as its application in England is concerned. In my view, it applies equally in Singapore.

In this case there can be no doubt that the infant's domicile was, at the time of her marriage, that of her father's, in other words in Holland. On the evidence before the trial Court, there can be equally be no doubt that, by reason of the Laws of Holland, the infant had no capacity to marry in as much as that at the time of the marriage she was under the age of 16 years, and could not, under that age, contract a legal marriage, unless the consents of the Queen of Holland and the girl's parents had first been given. There is no suggestion that these consents had ever been given.

There is, however, an exception to the general rule based on the decision in the case of *Sottomeyer v. De Barros*[8] that the validity of a marriage celebrated in England between the persons of whom the one has an English and the other a foreign domicile is not affected by any incapacity in the party having a foreign domicile, if the incapacity under the law of such foreign domicile does not pertain under the law of England. In considering the facts of and the law in this case the word "Singapore" must be substituted for the word "England" in construing this exception to the general rule.

In these circumstances it becomes necessary, having regard to the fact that the infant was undoubtedly domiciled in Holland, to consider whether the appellant was domiciled in Singapore. The 3rd defendant's own evidence is that he was a probationary school teacher attached to Bukit Panjang Government School, Singapore. That, in itself, does not establish a domicile in Singapore. The evidence of the 1st defendant is that the 3rd defendant was born in Kelantan. Although that does not necessarily establish a domicile in Kelantan, the fact remains that there is no evidence of domicile in Singapore.

For these reasons being of opinion that neither of the parties to the marriage was domiciled in Singapore, and it being clear that the infant had not the capacity to marry according to the law of her own domicile, I would dismiss the appeal of the 3rd defendant, in so far as the order relates to the custody of the infant, but I would vary the order by the deletion of that part which declares the marriage between the 2nd and 3rd defendants to be illegal, void and of no effect.

Order accordingly.

BUJANG BIN TUNGGAL v. REX.

[App. Crim. Juris. (Brown, Ag. C.J.) August 15, 1951]

[Singapore — Magistrate's Appeal No. 74, of 1951]

Penal Code, s. 211 — Intentional omission to apprehend on part of public servant — Distinction between 'motive' and 'intention'.

The appellant was an Inspector in the Singapore Police Force, and on the evening of Monday, December 11th was the senior officer at Geylang Police Station. Geylang Police Station took its orders from Beach Road Police Station which was under the command of Detective Inspector Ong. The appellant was charged under section 221 of the Penal Code with intentionally omitting to apprehend any persons who were liable to be apprehended as members of an unlawful assembly.

The learned District Judge found the appellant guilty of the offence charged giving his reasons and conclusions as follows:—

> "The accused was at all times material to the charge the senior police officer at Geylang Police Station. He had a considerable number of Police, fully armed, under his command, and it is not suggested that he took any effective steps towards the apprehension of any of the rioters in the immediate vicinity of the Police Station. I think the conclusion is inescapable that he was afraid to do so."

Held, that motive should always be distinguished from fear. The burden of proving the criminal intent remained throughout on the prosecution. And if the evidence shewed that appellant's failure to apprehend the rioters was consistent with the innocent intent of saving the injured by avoiding a course which might have put them in greater peril, the appellant was entitled to be acquitted.

[**Editorial Note:** — Although the major portion of the judgment deals with question of fact we have considered it advisible to publish the judgment in full so that it may be a guidance to the lower Courts.]

Cases referred to:—

(1) *Rex v. Stcane* (1947) K.B. 997; (1937) 3 All E.R. 920.

(2) *Ram Lal v. The Emperor* A.I.R. (1936) All. 651.

MAGISTRATE'S APPEAL.

K. A. Seth and *A. J. Braga* for the appellant.

E. P. Shanks (Crown Counsel) for the Crown.

Cur. Adv. Vult.

Brown, Ag. C.J.: — The appellant was an Inspector in the Singapore Police Force, and on the evening of Monday, December 11th, was the senior officer at Geylang Police Station. Geylang Police Station took its orders from Beach Road Police Station which was under the command of Detective Inspector Ong. The appellant was charged under section 221 of the Penal Code with intentionally omitting to apprehend any persons who were liable to be apprehended as members of an unlawful assembly.

The essence of the offence with which the appellant was charged was the criminal intent. The issue before the Court was whether the appellant, in omitting to apprehend any of the rioters, had the criminal intent of neglecting to perform his legal duty. A great deal of evidence was called by the prosecution. Some of it appears to be confused and in parts contradictory, and this is no doubt to be largely accounted for by the confused conditions which existed on that evening. But the evidence presents a comprehensive picture of the rioting outside Geylang Police Station and the general ineffectiveness of the Police in that area; and it shows that the appellant made no attempt to make any arrests. And that — in effect — was the prosecution case. I think it fair to say that it was based upon what I may describe as a *res ipsa loquitur* argument. There was serious rioting outside Geylang Police Station in which the Police were ineffective; the appellant was in charge of the station; no arrests were made; therefore the appellant must have had the criminal intent to neglect his duty to make arrests. It is clear from the Grounds of Judgment that this argument appealed to the learned District Judge. For after stating the issue to be "whether the omission to apprehend any rioters was intentional or whether the circumstances were such as to relieve him of what normally would have been his duty", he sets out his reasoning and his conclusion as follows :—

> "The accused was at all times material to the charge the senior police officer at Geylang Police Station. He had a considerable number of Police, fully armed, under his command, and it is not suggested that he took any effective steps towards the apprehension of any of the rioters in the immediate vicinity of the Police station. I think the conclusion is inescapable that he was afraid to do so."

I will say at once that, in my opinion, such a conclusion is very far from being inescapable if a due regard is paid to the evidence.

The appellant arrived at Geylang Police Station, according to the Occurrence Book, at 6.53 p.m. Outside the gate was an injured European; and on the other side of the street was a mob of rioters which has been variously estimated from 100 to 250. The appellant enquired why the injured man was not allowed inside the Station, and was informed that an order had come through that no civilians were to be allowed to enter. This order was confirmed by reference to the Occurrence Book, which contains two entries, one made at 4.20 p.m. and the other at 6.53 p.m., stating that no civilians are to be allowed to enter the Station. It was also confirmed by Sergeant 550 Ali bin Hakim, who stated in evidence that at 4.20 p.m. Inspector Ong had given an order over the telephone which read: "Not to allow anybody to enter the Station. Station personnel not to be allowed to go outside, and to increase the post." Thus two orders were alleged to have been given by Inspector Ong — (1) that nobody was to be allowed to enter the station, (2) that no Police personnel were to be allowed to go out. That these orders were misunderstood or misinterpreted appears to be clear from the evidence of Inspector Ong (who was called by the prosecution) and of Mr. Frew (who was called by the defence). Inspector Ong said that the only order he gave the sergeant was to put four armed sentries on the perimeter fence surrounding the Station and to prevent rioters from entering the station should rioting break out in that area. Mr. Frew, commmenting on the entries in the Occurrence Book, said that he was satisfied that the order which came initially from Mr. Livett in English, was mistranslated in Malay, and that it was merely an order requiring additional precautions in admitting civilians to the Police Station. Mr. Frew said that he had no doubt that what was written in the Occurrence Book was literally carried out at Geylang Police Station.

The clear evidence that the appellant, in common with his subordinates, accepted both orders as correct is the dominating feature of this case. Unless that fact is fully understood and accepted no proper understanding of this case is possible. It is to be observed that no mention is made of it in the Grounds of Judgment. Doubtless it may be said that a more efficient officer would have insisted on contacting Inspector Ong personally in order to enquire if two such orders could possibly be correct and to point out that there were injured civilians who required admittance. But there is documentary evidence in this case of which I need say no more than that, while the appellant's conduct during his 14 years service has been excellent, he was not regarded as an efficient officer.

It cannot be over-emphasized that the appellant's conduct that evening is to be judged in the light of what he believed to be his orders. Vehicles were burned in front of the Police Station, and persons were assaulted and injured. Acting upon what he believed to be the first order (twice recorded in the Occurrence Book) the appellant allowed no injured person to come inside the Police Station. Confined to the Station by the supposed second order, no Police officer went outside to give assistance — with the important exception of the appellant. And the evidence is that the appellant alone went outside, from time to time and rendered what assistance he could within the limitations imposed by the order.

At about 7.45 p.m. a Mr. Marsehner had his car smashed, and he himself was badly assaulted. He shouted for admittance to the Station. The appellant came out to the gate and said that he was sorry but he could not allow him to come in. This witness said that he was about 3½ hours outside the Police Station. During that time the appellant telephoned for an ambulance. On one occasion he took a glass of water out to the witness. On another occasion when the witness managed to get through the gate the appellant assisted him to go outside again and said that he would stand by him outside; and (says the witness) "Accused did stand by me outside the gate for sometime .... Accused said he had strict instructions not to allow any civilian to be in the station. Accused was quite polite .... Accused showed no fear of the rioters".

At about 8 p.m. a Roman Catholic priest, who was riding a motor-cycle, was set upon by the mob outside Geylang Police Station. He was beaten up and his motor-cycle burned. He ran to the gate of the Police Station, and he too was refused admittance. In regard to the appellant's conduct on this occasion a civilian bystander named Mohamed Ismail bin Sidik, gives the following evidence :—

"XXn: I was in a taxi at 8.30 p.m. I saw a priest standing at the gate of the police station. Accused came out with a bottle and some cotton-wool, he gave some of this to the priest. Accused managed to disperse the crowd. Accused several times went into the police station to phone, then the crowd gradually came back again.

While I was talking to the driver, accused came to the ambulance.

The crowd did not allow the ambulance to pass and take away the injured persons, though Accused tried to persuade them.

Accused tried four or five times to disperse the crowd.

Rxn: Crowd was successfully dispersed several times by Accused and myself."

And some understanding of the attitude of the rank and file in the Police Station may be gained from the following evidence of Corporal Mohamed Ali bin Busoo given in cross-examination :—

"None of us did anything to prevent the crowd stopping vehicles, because I was not allowed to go out of the station. I had an order from O.C.U. (Mr. Livett) through Sgt. 550. That is my only excuse for not going out to prevent this. The injured European was not allowed into the station because there was an order. When accused arrived he wanted to let the European in, but was told it was against orders."

And the appellant's evidence regarding the incident of the beating of the Roman Catholic priest is :—

"I ordered the sentry to open the gate quickly. He went into the charge room. The key of the gate was kept there. And the sentry opened the gate. I ran out and waved to the police in the charge room. No one came to my assistance. I got out. The crowd ran away in different directions."

The case of *Rex v. Steane*[1] was properly referred to in support of the appellant's case both here and in the Court below. It is unnecessary that I should refer to it at length, because the law in this case is very simple. The important element in the offence with which the appellant was charged was the criminal intent. The burden of proving the criminal intent remained throughout on the prosecution. And if the evidence shewed that his failure to apprehend the rioters was consistent with the innocent intent of saving the injured by avoiding a course which might have put them in greater peril, the appellant was entitled to be acquitted.

If a Police officer fails to perform his legal duty to apprehend an offender on account of fear that would be no defence to a charge under this section: *Ram Lal v. The Emperor*[2]. The motive is fear. But the intent is criminal. It is a criminal intent induced by fear. In the present case the learned District Judge found that the appellant failed to apprehend the rioters through fear. But that finding was contrary to the evidence. I can find no evidence at all that the appellant was afraid. On the contrary, he alone went out of the gate in front of the mob to assist and protect the injured. A more likely conclusion to draw from the evidence is that, believing that his orders precluded him from admitting the injured to the safety of the Police Station, and with subordinates who refused to follow him, he considered that his duty lay in protecting such of the injured as were immediately outside the station by endeavouring to pacify the mob which had them at their mercy. In this he was largely successful. The fact must be stressed that he was in effect single-handed, because none of his men would go out. In those circumstances what purpose would have been served by going out alone into a mob of between 100 and 250 rioters in order to endeavour to make arrests? And what might have been the result upon the injured? And what would have been the value of such a purpose compared with his purpose of standing by the injured and preventing the mob from inflicting further injuries upon them? As the appellant said in evidence: "If I had wanted to, I could not have arrested several men that evening." And the following passage from Mr. Haxworth's evidence seems to confirm this :—

"My fellow officers and I gave orders which were not of necessity disobeyed but the manner in which they were carried out left much to be desired. There was a reluctance to obey much more senior officers than the accused. Hence it became impossible to effect arrests at times and in difficult spots."

I have thought it right in this judgment to quote from the evidence at some length, because I think that the appellant is entitled to let the evidence speak for itself. I will only add that in the view which I take

of this case there was a total failure on the part of the prosecution to establish any criminal intent.

The appeal is allowed and the conviction quashed.

Appeal allowed and conviction quashed.

PUBLIC PROSECUTOR v. LIM CHAU SIU.

[App. Crim. Juris. (Paul Storr, J.) August 8, 1951]

[Johore Bahru — Criminal Appeal No. 9 of 1951]

Emergency (Rubber Control) Regulations, 1949, regulation 5(2) — Whether person convicted can be bound over under s. 294 of Criminal Procedure Code.

The respondent (accused) was charged under Emergency (Rubber Control) Regulations, 1949, regulation 5(2). The learned Magistrate found the respondent guilty and convicted her as charged. He sentenced her to be bound over to be of good behaviour for one year under section 294 of the Criminal Procedure Code.

Regulation 5(2) reads as follows:

"5(2). Any person who, on or after the 6th day of October, 1950, is unlawfully in possession of rubber shall be guilty of an offence and shall, on conviction, be punished by imprisonment for a term of not less than one year and not more than five years."

The Public Prosecutor appealed against the sentence as one being inadequate for the offence. He made two submissions to the Court: (1) that the learned Magistrate's powers under section 294 of the Criminal Procedure Code did not cover a person convicted under regulations 5(2) of the Emergency (Rubber Control) Regulations, 1949, as that regulation contained a minimum sentence of one year's imprisonment, and (2) that, if he was wrong in the above submission, then the learned Magistrate had not used his discretion in a judicial manner in view of the very serious nature of the offence which was against a special provision of the law whereby the offence was made especially reprehensible during the present emergency and that therefore the sentence was grossly inadequate in the circumstances of the case.

Held, that from the mandatory provisions of the regulation it is clear that if a Court convicts then it must sentence the convicted person to a minimum of one year's imprisonment or to such other term up to 5 years, and that the provisions of section 294(i), Criminal Procedure Code cannot have any application to a case where the Court has convicted a person under regulation 5(2) of these Regulations. However much the Court may sympathise with a convicted person, it is its duty to see that the law is properly administered as laid down by the legislature and that any feeling of sympathy that may be felt towards the accused person should not affect its decision.

Case referred to :—

(1) *Rennie v. Boardman* 111 L.T.R. 713.

CRIMINAL APPEAL: Appeal from Circuit Magistrate's Court, Kluang.

W. M. McCall (D.P.P.) for the appellant.

The respondent appeared in person.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Paul Storr, J. : — In this case the respondent (accused) was charged before the Circuit Magistrate at Kluang, under regulation 5(2) of the Emergency (Rubber Control) Regulations, 1949, with being in possession of about 9 katties of scrap rubber. The learned Magistrate found the respondent guilty and convicted her as charged. He sentenced her to be bound over to be of good behaviour for one year with cash security in the sum of $250 or in default one year's simple imprisonment. His reasons for so doing are given in his grounds of judgment as follows :—

"(a) The accused is a first offender for consideration under section 294 of the Criminal Procedure Code.

(b) The accused though a married woman has, her husband being a detainee at Majidi Camp under the Emergency Regulations, to feed 6 children ranging from the age of 14 years to 2 years."

Mr. W. M. McCall, the Deputy Public Prosecutor, appealed against the sentence as one being inadequate for the offence. He made two submissions to the Court: (1) that the learned Magistrate's powers under section 294 of the Criminal Procedure Code did not cover a person convicted under regulation 5(2) of the Emergency (Rubber Control) Regulations, 1949, as that regulation contained a minimum sentence of one year's imprisonment, and (2) that, if he was wrong in the above submission, then the learned Magistrate had not used his discretion in a judicial manner in view of the very serious nature of the offence which was against a special provision of the law whereby the the offence was made especially reprehensible during the present emergency and that therefore the sentence was grossly inadequate in the circumstances of the case.

With regard to the first submission made by the learned Deputy, section 294(i) of the Criminal Procedure Code reads as follows :—

"294. (i) When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any Court if it appears to such Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour."

It is clear from the wording of this section that the binding over after conviction is a substitution for imprisonment and remains so as long as the person convicted complies with the terms of the bond entered into. The point arises therefore as to whether section 294(i) can apply to the provisions of regulation 5(2)